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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 184

THOMAS W. SULLIVAN,
Petitioner

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, THOMAS W. SULLIVAN, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Supreme Court of Alabama rendered on the 30th of January, 1969, which affirmed the disbarment of petitioner by the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967.

A timely application for rehearing in the Supreme Court of Alabama was denied, without opinion, on the 6th of March, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama has been reported at 219 So2d 346, under the title: *In the Matter of Thomas W. Sullivan.*

A copy of this opinion is attached hereto in Appendix A, *infra,* pp. A1 thru A17.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on the 30th of January, 1969, and is annexed hereto in Appendix A, *infra,* p. A18.

A timely petition for rehearing was denied on the 6th of March, 1969, and the judgment of the Supreme Court of Alabama thereon is in Appendix A, p. A19.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S. Code, Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I

Whether or not a defendant in a state bar disciplinary proceeding, who received the ultimate penalty of disbarment, was tried before a fair and impartial tribunal, consistent with the Sixth and Fourteenth Amendments, United States Constitution, where certain members of that tribunal for determining guilt or innocence had voted previously for adoption of the rule defendant was determined to have violated.

II

Whether or not in a state bar disciplinary proceeding, where the penalty imposed was the ultimate one of disbarment, depositions could be used as evidence against the defendant consistent with the Sixth and Fourteenth Amendments, United States Constitution.

III

Whether Rule 36, Section A, Rules Governing the Conduct of Attorneys in Alabama, which condemns "any conduct unbecoming an attorney at law" and makes an attorney subject to discipline therefor, sufficiently establishes a standard of conduct reasonably ascertainable and definite to afford a constitutional guide or standard for an attorney consistent with the due process clause of the Fourteenth Amendment, United States Constitution.

IV

Whether an attorney in a disciplinary proceeding prosecuted by a state bar association which resulted in his disbarment is entitled to a trial by jury in accordance with the provisions of the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

V

Whether or not an attorney, consistent with the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, may be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the Alabama State Bar, approved by the Supreme Court of Alabama, which said rule is *contra* to the interpreted statutory law of the State of Alabama.

VI

Whether or not Rule 25, Section A, as last amended, Rules of the Board of Commissioners of the Alabama State Bar, which rule concerns the granting of divorces in the State of Alabama, is consistent with the freedom of religion clause of the First Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

VII

Whether or not the procedures regulating disciplinary proceedings in the State of Alabama, wherein the Board of Commissioners of the Alabama State Bar formulates rules, and acts, directly or indirectly, as accuser, prosecutor, judge and jury, are consistent with the due process clause of the Fourteenth Amendment, United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are set forth below (Appendix B, *infra,* pp. B1, *et seq.*)

STATEMENT OF THE CASE

This disciplinary proceeding has been in progress formally for almost five years.

On the 30th of June, 1964, the Grievance Committee of the Alabama State Bar filed charges (R. 1 thru 9) against your petitioner alleging violations of Rules 25 and 36, Section A, as last amended, Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama (Appendix B, *infra,* pp. B2 thru B3).

Succinctly stated, Rule 25, Section A, as last amended, proscribes certain conduct by attorneys in the procurement of divorces in the courts of Alabama, with particular emphasis upon the non-residency of both parties to a divorce action. Rule 36, Section A, as last amended, is the vague and general prohibition of "any conduct unbecoming an attorney at law."

This matter was in hiatus while related cases against other individuals involving other points were litigated through the courts of Alabama to this Court. See *Griffith, et al., petitioners, v. Board of Commissioners of the Alabama State Bar,* 382 US 988.

Additional charges against petitioner Sullivan were filed on the 29th of April, 1966 (R. 20 thru 21A). Violations of Rule 16, Section A (Appendix B, *infra,* p. B2) were added. Rule 16 concerns the offering of false or forged testimony in evidence.

On the 13th of June, 1966, petitioner filed his Motion to Dismiss Complaint, As Amended (R. 22 thru 25). *Inter alia,* Sullivan interposed the following federal constitutional objections:

> "5. For that Section A, Rule 36, of the Rules Governing the Conduct of Attorneys in Alabama, which condemns 'any conduct unbecoming an attorney at law' and makes an attorney subject to discipline therefor, fails to establish a standard of conduct reasonably ascertainable and sufficiently definite to afford a constitutional guide or standard for an attorney in violation of Amendment XIV, United States Constitution.

"13. For that the proceeding is void in that it does not provide for a trial by jury of the issues alleged, in violation of the state and federal constitutions.

* * *

"16. For that Rule 25, Section A, as last amended, Board of Commissioners of the Alabama State Bar, is *contra* to the interpreted statutory law of the State of Alabama, particularly Title 34, Sections 27 and 29, Code of Alabama, 1940, and, as a result, said Rule violates the due process clause of Article I, Section 6, Constitution of Alabama, 1901, and the due process and equal protection clauses of Amendment XIV, Constitution of the United States."

An amendment to the foregoing Motion to Dismiss was filed on the 6th of September, 1966 (R. 33 thru 35). *Inter alia,* the ensuing federal constitutional points were raised:

"23. For that Section A, Rule 25, as last amended, is null, void and illegal inasmuch as marriage is a civil contract only, as any other contract, and to require that a party to a divorce, or one of the parties, be a bona fide resident of the State of Alabama is a violation of the due process clauses of the State and federal constitutions and the equal protection clause of Amendment XIV, Constitution of the United States.

* * *

"25. For that Section A, Rule 25, as last amended, is null, void and illegal in that the Supreme Court of Alabama has on a recent occasion in *Lutsky v. Lutsky,* 183 So2d 782 (March 3, 1966), held that even though neither party to a divorce was domiciled in the State of Alabama it would not disturb the decree, thus creating such uncertainty in the law of divorce in Alabama as to cause said rule to violate the rights of defendant guaranteed by the due process clauses of the state and federal constitutions and the equal protection clauses of Amendment XIV, Constitution of the United States.

"27. For that Section A, Rule 25, as last amended, is null, illegal and void inasmuch as marriage is a civil

contract only, as any other contract, and to require that the parties to a divorce, or one of the parties, be a bona fide resident of the State of Alabama when both parties are before the court, which court has jurisdiction of the subject matter is a violation of Amendment I to the Constitution of the United States as the same is made applicable to the State of Alabama by operation of the XIVth Amendment to the Constitution of the United States."

Also, on the 6th of September, 1966, Sullivan filed a Motion to Suppress Depositions (R. 54), which contained the following ground, among others:

"3. For that this proceeding is quasi-criminal and highly judicial and to permit the use of a deposition without the consent of the defendant violates his right of confrontation guaranteed by Amendment VI, Constitution of the United States, as the same is made applicable to the State of Alabama by the operation of Amendment XIV, Constitution of the United States."

In addition, Sullivan, on or about the 12th of February, 1967, filed his motion to suppress all evidence taken by deposition in this matter, with the exception of the deposition of John B. Scott, secretary-treasurer, Alabama State Bar, which was taken at defendant's request. All evidence for the prosecution was taken outside the presence of the Board of Commissioners of the Alabama State Bar, which determined his guilt or innocence. The federal constitutional grounds were specifically spelled out, and followed that delineated above in the Motion to Suppress Depositions of the 6th of September, 1966.

In the meanwhile, petitioner was charged with additional violations of Rule 36, Section A, on the 14th of November, 1966 (R. 228 thru 234), to which he re-filed all his previous objections.

The record reveals that Rule 25, Section A, was amended on the 20th of July, 1961, to its present reading (R. 196-197). The guilt or innocence of Sullivan on a charge or charges of violations involving, among others, Rule 25, was determined by a meeting of the Board of Commissioners of

the Alabama State Bar on the 3rd of March, 1967 (R. 339, *et seq.*). Messrs. Walker, Blackburn, McQueen, Brantley, Hill, McCord, Carnes, and McDonnell were present on the 20th of July, 1961, and also on the 3rd of March, 1967. Exception on Fourteenth Amendment grounds to such a procedure was taken by filing Objections to Certain Members of Board of Commissioners of the Alabama State Bar.

The Board of Commissioners is the governing body of the integrated Alabama State Bar. Title 46, Section 21, *et seq.*, Code of Alabama, 1940, as amended. By Title 46, Section 25, Code of Alabama, 1940, the Board is given broad powers to formulate rules governing the conduct of attorneys in Alabama, such rules being subject to the approval of the Supreme Court of Alabama; it investigates complaints made against attorneys; it appoints a committee (Grievance Committee) to take evidence against the charged attorney, which evidence is transmitted to the Board; the Board then sits as a judge and acts as a jury in the disciplinary matter; and the case is prosecuted by the aforesaid Grievance Committee and the general counsel of the Alabama State Bar, who is appointed by the Board of Commissioners (R. 339, *et seq.*).

Petitioner, at the first opportunity, on the 6th of September, 1966, interposed the following objection:

> "MR. BLANTON: I would make a further objection to the entire proceeding in that there are no rules which are intelligible covering these proceedings by the Alabama State Bar Board of Commissioners and that in view of that indefiniteness that the defendant, Thomas W. Sullivan, is denied due process under Article I, Section 6, Constitution of Alabama, and Amendment XIV, Constitution of the United States."

The Board found petitioner guilty of Charges FIVE (Rule 25, Section A-Ruggerio-R. 20); SIX (Rule 16, Section A-Ruggerio-R. 21); SEVEN (Rule 36, Section A-Ruggerio-R. 21A); and NINE (Rule 36, Section A-Nichols-R. 231-232). The punishment assessed was disbarment as to each charge separately and severally (R. 346).

A petition for review of this judgment of disbarment was duly heard by the Supreme Court of Alabama, and a decision affirming the disbarment was rendered on the 30th of January, 1969. Timely application for rehearing was denied on the 6th of March, 1969.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court has had before it previously one aspect of this disciplinary proceeding against petitioner. *Sullivan v. Alabama State Bar, etc., et al.,* October Term, 1968, No. 1170. There it was the decision of the Court, through affirmance rendered on April 28, 1969, that the Alabama State Bar and its Board of Commissioners were not within the "one-man, one-vote" doctrine applicable to governmental subdivisions possessed of greater legislative powers. No further point is made here of this facet on the merits.

Nonetheless, petitioner raised, and he believes properly and timely, other objections based upon his rights as a first class citizen of the United States entitled to each and every federal constitutional right when prosecuted by the Alabama State Bar for violation of rules of conduct.

The penalty—disbarment—was severe, perhaps more so in some respects than imprisonment in the penitentiary. There are within the jurisdiction of this Court more than 50 bar associations which, in one procedural method or another, either prosecute attorneys for violations of rules of conduct before judicial tribunals, or themselves impose punishment upon erring members, though Alabama is believed to be only state which approves disbarment by a bar association.

No case has been found where this Court, with certain exceptions on a very specific and limited point, *e.g., Spevack v. Klein,* 385 US 511, has considered the broader ramifications of the impact of the United States Constitution on state bar disciplinary procedures. In an era which has emphazied individual liberties guaranteed by the United States Constitution, it is submitted an examination of the constitutional rights of a lawyer *vis-a-vis* the organization which prosecutes him is of national importance.

I

WHETHER OR NOT A DEFENDANT IN A STATE BAR DISCIPLINARY PROCEEDING, WHO RECEIVED THE ULTIMATE PENALTY OF DISBARMENT, WAS TRIED BEFORE A FAIR AND IMPARTIAL TRIBUNAL, CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, WHERE CERTAIN MEMBERS OF THAT TRIBUNAL FOR DETERMINING GUILT OR INNOCENCE HAD VOTED PREVIOUSLY FOR ADOPTION OF THE RULE DEFENDANT WAS DETERMINED TO HAVE VIOLATED.

One function of the Board of Commissioners of the Alabama State Bar is to determine the facts allegedly tending to demonstrate the guilt of defendant. *Arguendo,* the Board must be considered the petit jury. (It is also, *arguendo,* the grand jury). Petitioner was a defendant, see Ex parte *Dozier,* 262 Ala 197, 77 So2d 903, in a quasi-criminal and highly judicial trial. See Ex parte *Messer,* 228 Ala 16, 152 So 244, quoted with approval in Ex parte *Huie,* 278 Ala 330, 178 So2d 156.

The Board of Commissioners formulated the rule under which petitioner was prosecuted actually, if not specifically, *i.e.,* Rule 25, Section A, as amended. The Supreme Court of Alabama has recognized that in criminal trials great care should be exercised to preserve to accused his constitutional rights to a fair trial by an impartial jury, and that in such cases any doubt as to the competence of a juror should be resolved in favor of a defendant. See *Wilson v. State,* 243 Ala 1, 8 So2d 422.

In the present case the Supreme Court of Alabama stated as follows:

> "Assignment of Error III presents the question of the qualification of some eight members of the Board of Commissioners to sit in the present proceedings since they were members of the Board in 1961, at the time when Rule 25, Section A, as amended, was formulated by the Board of Commissioners.
>
> "A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute in-

volved in litigation before him, *Norton v. Lyon Van and Storage Co.,* 9 Cal. App. 2d 199, nor does the fact that a prospective juror favors a statute, afford evidence that such juror is biased against a person accused of violating such statute. *State v. Sullivan,* 97 Wash. 639, 166 P. 1123. See also *48 C.J.S., Judges, Sec. 82,* and *50 C.J.S. Juries,* Sec. 244. By analogy those members of the Board who were also members at the time Rule 25, Section A was formulated, were not, for that reason, disqualified to sit in the present proceedings." (Appendix A, *infra,* p. A9).

The conclusion is inescapable that the Supreme Court of Alabama has placed defendant attorneys in a special category quite different from other defendants, even those prosecuted in so-called quasi-criminal matters. For instance, it has been held in Alabama that a person is disqualified to sit as a juror where it is his duty to enforce the laws of a city, the violation of such a law being the subject matter of the prosecution. *Shapiro v. City of Birmingham,* 30 Ala App 1, 10 So2d 38.

Thus, considering the sitting of the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967, as tantamount to the deliberations of a petit jury, then it is evident petitioner Sullivan was denied that fair and impartial tribunal for the determination of his guilt or innocence guaranteed by the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution.

II

WHETHER OR NOT IN A STATE BAR DISCIPLINARY PROCEEDING, WHERE THE PENALTY IMPOSED WAS THE ULTIMATE ONE OF DISBARMENT, DEPOSITIONS COULD BE USED AS EVIDENCE AGAINST THE DEFENDANT CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Every shred of evidence against petitioner was brought before the Board of Commissioners on the 3rd of March, 1967, by means of depositions, affidavits or other proceedings held outside the presence of the several commissioners.

The Supreme Court of Alabama commented on the objection interposed to such evidence, thusly:

"Assignment of error V asserts error because of the action of the Board of Commissioners in denying petitioner's motion to suppress the deposition of Jean Ruggerio.

* * *

"On 3 June, 1966, a due and proper notice was sent to counsel for petitioner by registered mail that the deposition of Jean Ruggerio would be taken at a specified time and place on 23 June 1966, in Berkeley Heights, New Jersey, before an officer authorized to administer oaths by the laws of New Jersey, for the purpose of discovery or for use as evidence.

"The deposition was duly taken in accordance with the notice. The petitioner made no appearance, either by writing, by counsel, or in person.

"Section 25 of Title 46, Code of Alabama, 1940, found in Article 1 of said Title relating to the organization of the Bar of Alabama, provides that:

'***the evidence of witnesses residing outside such county (county of residence of charged attorney) may be taken in the same manner as provided by law for the taking of depositions in civil cases." (Par. and Underlining ours.)

* * *

"This argument is succinctly answered by the following quotation from *Ex parte Messer,* 228 Ala. 16, 152 So. 244, a disbarment proceedings:

'It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to *quasi criminal proceedings;* that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N.E. 407.' (Appendix A, *infra,* pp. A10 thru A11).

The validity of most parts of the foregoing quotation

from *Messer* has been placed in limbo by such cases as *Spevack v. Klein,* 385 US 511. And characterization of a disbarment proceeding as quasi-criminal or *sui generis* cannot circumvent the applicability of federal constitutional standards. Compare *Bloom v Illinois,* __ US __ (Decided May 20, 1968) (Contempt proceeding).

Thus, it is the position of petitioner that he was not confronted with the witnesses against him *in the tribunal which adjudicated his guilt.* See *Pointer v. Texas,* 380 US 400. To cast upon a defendant, as in this case, the burden of traveling from Alabama to New Jersey, with his counsel, to enjoy his constitutional right of confrontation is patently a denial of the right by indirection, especially if the contention be advanced that this was his opportunity to enjoy the right, and by not so exercising it in New Jersey it was waived.

Casting aside the labeling of disbarment proceedings as being quasi-criminal, the core of the matter is that disbarment is a severe *punishment.* In this context, then the Sixth Amendment right to confrontation cannot be sidetracked while the prosecution proceeds full throttle on the main line to conviction. While the public must be protected from unethical attorneys, as it must be protected from criminals, nonetheless, where the punishment is of great magnitude, then federal constitutional standards of right should be applied. Compare *Duncan v. Louisiana,* __ US __, (Decided May 20, 1968.)

III

WHETHER RULE 36, SECTION A, RULES GOVERNING THE CONDUCT OF ATTORNEYS IN ALABAMA, WHICH CONDEMNS "ANY CONDUCT UNBECOMING AN ATTORNEY AT LAW" AND MAKES AN ATTORNEY SUBJECT TO DISCIPLINE THEREFOR, SUFFICIENTLY ESTABLISHES A STANDARD OF CONDUCT REASONABLY ASCERTAINABLE AND DEFINITE TO AFFORD A CONSTITUTIONAL GUIDE OR STANDARD FOR AN ATTORNEY CONSISTENT WITH THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Petitioner challenged the validity of Rule 36, Section A, for vagueness and argued this in brief. As was stated by the

Court in *Connally v. General Construction Co.*, 269 US 385, 391, it is a rule "which forbids ***the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Contrast *Zwickler v. Koota*, 389 US 241.

Thus, what may be considered by one attorney to be conduct unbecoming an attorney would not be so construed by another. Does "conduct unbecoming an attorney" encompass the personal life of an attorney? The mores of a community certainly offers no ascertainable standard which is definite, since, even within a state, community moral standards may differ widely. What might be considered conduct unbecoming an attorney in a rural community might be acceptable practice in an urban community.

Nonetheless, over objection, the Board of Commissioners found petitioner guilty on two charges involving Rule 36, *i.e.*, Seven and Nine.

Sullivan submits that since a severe *punishment* was imposed, and was capable of being imposed from the outset of this disciplinary proceeding, that federal constitutional standards of definiteness must be met as though the matter were strictly criminal. And this conclusion must still be reached even though these two charges did supply elements of specificity.

IV

WHETHER AN ATTORNEY IN A DISCIPLINARY PROCEEDING PROSECUTED BY A STATE BAR ASSOCIATION WHICH RESULTED IN HIS DISBARMENT IS ENTITLED TO A TRIAL BY JURY IN ACCORDANCE WITH THE PROVISIONS OF THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION, AS THE SAME IS MADE APPLICABLE TO THE STATE OF ALABAMA BY OPERATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Petitioner interposed the objection that the proceedings against him were void because a trial by jury was not provided for in the statutes concerning disciplinary proceedings.

The Supreme Court of Alabama in its latest pronouncement on a trial by jury in disciplinary matters concerning attorneys stated in *In the Matter of John Ike Griffith*, 219 So2d 357 (Ala. 1969) (Decided February 6, 1969, rehearing denied March 6, 1969), as follows:

> "Petitioner strongly insists that he was entitled to a trial by jury. The question of whether an attorney is entitled to trial by jury in disbarment proceedings has been voluminously researched and argued in jurisdictions throughout the country. This court examined and discussed the question in detail in *Thompson,* supra (228 Ala 113, 152 So 229), where it was held:
>
> > '***(T)hat the courts have the inherent power to suspend or to remove attorneys without trial by jury.***'
>
> "That proposition has been consistently followed in this jurisdiction and in other jurisdictions. Although petitioner urges us to reverse *Thompson,* supra, we reaffirm our adherence to the principle that courts have inherent power to suspend or remove attorneys without trial by jury in order to protect the dignity of the court, and maintain the respect of the public for our legal system. We, therefore, find no error in the refusal to grant petitioner a trial by jury."

Sullivan consistently has denominated disbarment as a severe *punishment*. A disbarment does protect the dignity of the court, but a conviction for contempt is of the same stripe. A severe *punishment* for contempt falls within the ambit of a constitutionally protected right to trial by jury. See *Bloom v. Illinois,* __ US __ (Decided May 20, 1968). The attorney undertaking his defense of charges which could, and in this case did, result in disbarment, should likewise be cloaked with the protection of a trial by jury. The power of a court to punish for contempt or to suspend or disbar an attorney for offenses committed in its presence is outside the scope of this discussion. The present charges concerned alleged violations committed outside the presence of any court or any organization or tribunal sitting to determine guilt or innocence.

Petitioner submits there is no constitutional difference between a situation involving out-of-court contempt and out-of-court violations of ethical standards and that, as a result, he should, of right, be entitled to a trial by jury. That past procedures are not sacrosanct when the inherent power of a court is involved is amply illustrated in *Bloom, supra.* Denominating proceedings as *sui generis,* or otherwise, to avoid constitutional limitations is to no avail.

V

WHETHER OR NOT AN ATTORNEY, CONSISTENT WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, MAY BE PROCEEDED AGAINST IN A DISBARMENT ACTION WHERE THE THRUST OF THE COMPLAINT AGAINST HIM IS A VIOLATION OR VIOLATIONS OF A RULE OF CONDUCT OF THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, APPROVED BY THE SUPREME COURT OF ALABAMA, WHICH SAID RULE IS *CONTRA* TO THE INTERPRETED STATUTORY LAW OF ALABAMA

Title 34, Section 29, Code of Alabama, 1940, as amended, is as follows:

> "Sec. 29. *If defendant a non-resident, a year's residence by plaintiff must be proved.* When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided, however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

According to *Jennings v. Jennings,* 251 Ala 73, 36 So2d 236, there is no jurisdiction over the subject matter in a *nisi prius* court to grant a divorce unless one party to the action be domiciled in Alabama. Hence, *arguendo,* the *proviso* in the foregoing statute is null and void.

Therefore, it follows that any decree entered by a court where both parties are non-residents would be null and void. Yet, in case after case, the Supreme Court of Alabama has upheld non-resident divorces on grounds of "laches" or "estoppel," *e.g., Levine v. Levine,* 262 Ala 491, 80 So2d 235; *Lutsky v. Lutsky,* 279 Ala 185, 183 So2d 782. Thus, where there is laches or estoppel, the end result is a valid final decree of divorce.

Until an action to set aside a decree is filed and heard, it is impossible to state with assurance a divorce decree where both parties are non-residents is null and void. On the contrary, the presumption must be that such divorce decrees are valid and binding until an action to set aside is decided adversely to the decree. Rule 25, Section A, as amended, causes the obtaining by an attorney of basically legal results to be denominated unethical.

In *Ruggerio,* involved in Charges Five, Six and Seven in the instant case, there was oral testimony before the register (R. 170-171) wherein complainant stated "I***am a bona fide resident of the State of Alabama, residing at 100 Commerce Street, Montgomery, Alabama." There was no appeal from the acceptance by the trial court of this testimony as being sufficient to prove domicile in Alabama. In *Levy v. Levy,* 256 Ala 629, 56 So2d 344, the trial judge, acting upon statements similar to those in *Ruggerio,* found "the evidence is not sufficient to satisfy the court of the truth in fact of complainant's domicile in this state," and reached the conclusion "the court has no jurisdiction over the subject matter."

In *Ruggerio,* it is patent the trial court had been satisfied such statements were sufficient to establish domicile of complainant, even though from the standpoint of *Levy* the trial court might have been in error. This error is correctable on appeal. See *Hilley v. Hilley,* 275 Ala 617, 157 So2d 215.

Thus, the error, if error it be, of the trial court in pursuing this course of action is being visited upon the attorney.

The Supreme Court of Alabama answered this argument thusly:

"The fallacy of this argument is that Rule 25, Section A in no way departs from the applicable divorce statutes

> as to jurisdiction, nor the decisions thereunder, but reinforces these principles. Rule 25, Section A, as amended, was formulated by the Bar, and approved by this court in an effort to eliminate, or lessen, the scandalous 'quickie divorce' racket with its local and national ramifications. It is an effort to regulate the ethical conduct of attorneys, and the validity or invalidity of a divorce decree, or the operation of laches or estoppel is beside the point. We find no merit in this contention."

Petitioner, to the contrary, is of the considered opinion that the crux of the matter is otherwise: Can what is legal and valid be cast in the mold of unethical conduct so that an attorney who obtains legal and valid results be proceeded against and disbarred? While some may consider that the so-called "quickie divorce racket" produced a national scandal as regards Alabama and properly should be eliminated, the ultimate question is whether or not the solution comports with the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

No particular or specific period of residence in Alabama is required of a complainant in a divorce action where the respondent is a non-resident when the court has jurisdiction of both parties to the cause of action, the only jurisdictional requirement being that complainant be *domiciled* in the state so as to confer upon the court jurisdiction of the *res.* See *Levy, supra; Hilley, supra.* Hence, the Supreme Court of Alabama has refused to set aside a divorce decree where one of the parties thereto objected. *Aiello v. Aiello,* 272 Ala 505, 133 So2d 18.

Rule 25, Section A, as amended, is, therefore, causing conduct of an attorney in procuring divorces, unless he be able to probe the mental processes of his client and ascertain his true intention as to future permanent residence in the State of Alabama, to be denominated unethical and subjecting himself to disbarment, although the divorce decree obtained be valid for all intents and purposes under the pertinent statutes. Petitioner submits this clearly violates his rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

VI

WHETHER OR NOT RULE 25, SECTION A, AS LAST AMENDED, RULES OF THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, WHICH RULE CONCERNS THE GRANTING OF DIVORCES IN THE STATE OF ALABAMA, IS CONSISTENT WITH THE FREEDOM OF RELIGION CLAUSE OF THE FIRST AMENDMENT, UNITED STATES CONSTITUTION, AS THE SAME IS MADE APPLICABLE TO THE STATE OF ALABAMA BY OPERATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Until the reign of Henry VIII, England was Roman Catholic, and, hence, marriage was regarded by the church as a sacrament, and, therefore, indissoluble. Matrimonial causes lodged in ecclesiastical courts, which had power to grant a divorce *mensa et thoro.* Such a divorce might be had by either husband or wife, when the gross misconduct of the other spouse, such as adultery or cruelty, rendered it impossible for them to live together. The judicial separation was had only on the strictest proof of the act charged, and it had to be established firmly the parties were not colluding to escape their marital obligations, the complaining party was free from guilt, and the offense had not been condoned. Basically, these are yet the requirements in Alabama for the obtaining of a divorce.

Ecclesiastical courts also entered decrees of nullity because of some lack of capacity which caused the marriage to be void *ab initio.* But it is emphasized jurisdiction of divorce remained in church courts even after Henry VIII and the break of England from the ties of the Pope of Rome. In fact, these courts retained their matrimonial jurisdiction until the middle of the 19th century, 1857, when a Court of Divorce and Matrimonial Causes was created.

In the United States there were no ecclesiastical courts, and American courts of equity did not regard themselves as having jurisdiction in divorce matters, until such jurisdiction was conferred by statute.

In a word, our Anglo-Saxon heritage in the field of divorce is deeply rooted in that amalgamation of church and

state extant in England. In fact, the Supreme Court of Alabama has stated that marriage is the most sacred of all the domestic relations which obtain among the citizens of Alabama. See *Harrison and Saunders v. Harrison,* 20 Ala 629, 644, quoted with approval in *Jennings v. Jennings, supra,* as a compelling reason courts of one state will not divorce citizens of another state. Yet, oddly, that same sacred marriage, in whatever state performed, may be annulled with impunity in Alabama, see *Gwin v. Gwin,* 219 Ala 522, 122 So 648, although the rationale is there was never any marriage.

Recently, the London *Daily Express* reported on a White Paper of a Law Commission dealing with divorce in England. Consideration, it was stated, was being given to divorce by consent, *i.e.,* marriage is a civil contract which may be dissolved as any other contract.

To the point, the historical background of divorce established the religious overtones. By reasoning that the state has an interest in the marriage, the court merely continues in other terms the interest of the church in marriage. This, defendant submits, is but the imposition of a religion by a state. The First Amendment, as drawn into the Fourteenth Amendment, United States Constitution, forbids such results.

The Supreme Court of Alabama had this to say regarding this argument:

> "Counsel also contends that by recognizing the state's interest in divorce matters, the courts are thereby merely continuing the interest of some religious views as to the indissolubility of marriage, thereby imposing religious views in the form of law, in violation of the First Amendment of the United State Constitution.
>
> "The fact that society as a whole, and religions, may both have interests in the continuation of marriages by no means violates any provision for the separation of church and state.
>
> "The interest of the church is basically an interest in the sanctity of marriage as a holy bond, while the interest of the state is basically materialistic, i.e., support of the wife and children and not casting them upon society

for support, though admittedly many decisions in passing recognize the spiritual aspects of the marriage bond." (Appendix A, *infra,* p. A14).

Petitioner would only add in rebuttal to this conclusion by the Supreme Court of Alabama that actually the proposition advanced is that marriage is merely a civil contract, and should be treated as such, *i.e.,* where two adult parties are before a court with plenary jurisdiction then the contract should be dissolved if that is the desire of the parties, and it matters not from what state those parties might be, since they should be free, constitutionally, to travel to Alabama and dispatch their business as best they see fit.

VII

WHETHER OR NOT THE PROCEDURES REGULATING DISCIPLINARY PROCEEDINGS IN THE STATE OF ALABAMA, WHEREIN THE BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR FORMULATES RULES, AND ACTS, DIRECTLY OR INDIRECTLY, AS ACCUSER, PROSECUTOR, JUDGE AND JURY, ARE CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Leonard Levy in his 1968 book, *Origins of the Fifth Amendment,* describes in minute detail the machinations of the High Commission in England during the later part of the Sixteenth Century.

It is quite striking in how many details the procedures utilized by the High Commission in ferreting out and convicting heretics are reflected in the procedures utilized in this case by the Board of Commissioners of the Alabama State Bar to assure the disbarment of an attorney.

Some years ago the Board of Commissioners of the Alabama State Bar concluded, patently, that divorce lawyers utilizing Title 34, Section 29, Code of Alabama, 1940, as amended, *supra,* were undermining the State by damaging its image. Accordingly, Rule 25, Section A, was amended, and when some attorneys continued to utilize the section on, among other bases, their considered legal opinion that the rule was invalid, the Alabama State Bar sent its investi-

gators into the precincts to ferret out the offenders. One of those ferrets was Maultsby Waller, who turned up in this case as the commissioner appointed by the president of the Bar to take testimony! (R. 294 thru 301)

The Grievance Committee, appointed by the Board of Commissioners, then undertook to go hither and yon in and out of the State of Alabama to take testimony. After all this was done, though petitioner had made many objections as the record discloses, the results were collected into a neat bundle and deposited with each commissioner. Petitioner was completely in the dark as to the merits of any of his many motions, objections, etc., until *AFTER* the so-called hearing in Montgomery, Alabama, before the Board of Commissioners on the 3rd of March, 1967 (R. 339-340), *when they were summarily overruled.* The Board of Commissioners was then acting as a judge in relation to the legal matters presented.

A representative of the Board-appointed Grievance Committee together with the Board-appointed general counsel of the Alabama State Bar prosecuted defendant on the 3rd of March, 1967.

Then, without hearing or having an opportunity to study the demeanor of any witness for the prosecution, the Board proceeded to sit as a petit jury and determined the facts in the case, reaching a conclusion of guilt on Charges Five, Six, Seven, and Nine.

Furthermore, the Grievance Committee repeatedly attempted to question the defendant, which maneuver was resisted strenuously at every turn since it was the firm belief of defendant that attorneys do have constitutional rights as other citizens. This position was vindicated when *Spevack v. Klein, supra,* was decided. And it must be admitted that in the face of *Spevack,* Charge Eight involving the refusals to answer questions was withdrawn.

Nonetheless, the totality of the circumstances surrounding the present proceeding, as amply revealed by the entire record, shrieks with unfairness. *EVERY FACET WAS UNDER THE CONTROL OF THE BOARD OF COMMISSIONERS OF THE STATE BAR FROM THE FORMULATION OF RULE 25, SECTION A, AS*

AMENDED, TO CONVICTION. And, notwithstanding the decision of this Court in *Sullivan v. Alabama State Bar, etc., supra,* the Board of Commissioners did not fairly represent the lawyers of the State of Alabama.

It is well and good that lawyers keep their own house in order! However, petitioner is entitled to full constitutional rights in his position as a defendant in a proceeding which could, and did, inflict a punishment. In a society which spends millions of dollars to see that one self-admitted murderer receives justice through a fair trial, it is indeed awkward and embarrassing that lawyers, so zealous in their pleas for others, cannot afford one of their own the ultimate in Fourteenth Amendment due process!

This matter will have run its course on the determination of this petition, now in the conscience of the Court. The questions are quite simple: Do we, as lawyers, in the Twentieth Century sanction procedural methods which hark back four hundred years? Has two hundred years of constitutional government not taught us that everyone, even a lawyer, is entitled to the protection of the safeguards of the federal constitution? Are we, as lawyers, to endorse a procedure which reeks of the noxious odor of the High Commission of the Sixteenth Century?

CONCLUSION

For the reasons stated, and admittedly somewhat at length, the petition for writ of certiorari in this case should be granted in order that the case can be fully briefed on the merits of the questions presented so the lawyers under the jurisdiction of this Court in the several states, the District of Columbia, the territories and possessions, may be fully informed of their constitutional rights as lawyers.

Respectfully submitted,

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Counsel for Petitioner

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1968-69

In the Matter of Thomas W. Sullivan
(Re Thomas W. Sullivan

v.

3 Div. 277

Board of Commissioners of Alabama State Bar)

Petition for Review

PER CURIAM

This is a review of an order or resolution of the Board of Commissioners of the Alabama State Bar finding Thomas W. Sullivan guilty of certain charges preferred against him and disbarring him as a practicing attorney at law.

As originally filed the complaint against Sullivan contained four charges. By subsequent amendments seven additional charges were added to the complaint.

Charge eight was withdrawn, and resolutions of not guilty were entered by the Board of Commissioners as to charges one, two, three, four, ten, and eleven, and resolutions of guilty as to charges five, six, seven, and nine.

Charge five accuses the petitioner of violation of Rule 25, Section A, of the Rules Governing the Conduct of all Persons admitted to the Practice of Law in the State of Alabama, in that in May or June 1962, the petitioner while serving as a referring or forwarding attorney, did in association with E. C. Boswell, submit to the Inferior Court of Geneva County, Alabama, a divorce case, namely Dominick Rugerrio v. Jean Rugerrio, Case No. A-256, wherein the bill of complaint and deposition of complainant represented to the court that the complainant was a bona fide resident of the State of Alabama, when in truth and in fact, the petitioner knew, or had reasonable cause to believe, that neither the complainant therein nor the respondent was a bona fide resident of the State of Alabama.

Rule 25, Section A, as amended, reads as follows:

"No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) File or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complainant or cross bill of complainant therein, a bona fide resident of the State of Alabama;

(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false."

Charge Six charges petitioner by his acts in connection with the Rugerrio case, with violating Rule 16-A of the Rules Governing the Conduct of all Persons admitted to Practice in this State by introducing or offering to introduce testimony which he knew to be false or forged.

Charge Seven charges petitioner with conduct unbecoming an attorney in violation of Rule 36, Section A, as amended, governing the conduct of attorneys in Alabama.

Charge Nine is to the effect that on, to-wit; 27 December 1965, Mrs. Florence Nichols, then a resident of the State of Delaware, consulted with the petitioner in his office in Montgomery, Alabama, and was advised by petitioner that he could obtain an Alabama divorce for her within the near future. Mrs. Nichols thereupon paid petitioner $650.00 and then returned to Delaware. It is further charg-

ed that Mrs. Nichols has made numerous attempts to contact the petitioner by letter and telephone, and obtain information concerning her divorce; that a diligent search of the records of the Bureau of Vital Statistics of the State of Alabama, failed to disclose that petitioner has instituted any proceedings for divorce on behalf of Mrs. Nichols; that the petitioner's acceptance of a fee from Mrs. Nichols, and his assurance that he would institute and prosecute a divorce action in violation of Rule 25, Section A, as amended, of the Rules of Conduct governing Attorneys in this State, and his failure to respond to inquiries from Mrs. Nichols, constituted conduct unbecoming an attorney in violation of Rule 36, Section A, governing the conduct of attorneys in this state.

Evidence

Charges Five, Six, and Seven (Ruggerio Divorce).

Mrs. Jean Ruggerio testified by deposition taken at Berkeley Heights, New Jersey, that she was a life-long resident of New Jersey. She had married Dominic Ruggerio and for over ten years prior to 10 December 1963, they had resided at Stonehouse Road, Basking Ridge, New Jersey.

On 10 December 1963, Mr. Ruggerio told her he had some papers from Alabama and he wanted her to sign them. He stated he wanted to go to Alabama and get a divorce—that some of his friends had gone to Alabama and gotten a divorce in a matter of a week. Mr. Ruggerio further told her he had seen a doctor and made arrangements to take a two weeks sick leave to go to Alabama to get the divorce.

On the envelope in which the papers were sent was the name Sullivan, though she did not remember the first name.

That night (10 December 1963) she and Mr. Ruggerio went before Harold Thompson (shown by other papers to be a notary public), and she signed the papers. Mr. Ruggerio left their home that night.

About a week later Mr. Ruggerio called her at her mother's home. He said he was in Newark, and told her that

things did not go in Alabama as he expected, and he wanted her to meet him at their home that night and talk things over. She went to their former home that night and Mr. Ruggerio told her he wanted her to return home, forget about everything, and start all over. However, she thought it best that they stay apart for awhile.

On 1 April 1964, she called Mr. Ruggerio at their former home and a girl answered the phone. She asked what she was doing there and the girl told her she and Mr. Ruggerio planned to get married. She asked her how she could when she (Mrs. Ruggerio) had not divorced him.

She called Mr. Ruggerio at his place of employment but he had left to go home. He later called her at her mother's home, and then came there. He handed her a divorce decree stating it was as legal a divorce as she could get.

This decree was rendered by the Inferior Court of Geneva County on 18 January 1964, in the case of Dominic Ruggerio v. Jean Ruggerio, submitted on the complaint of Dominic Ruggerio, and the answer and waiver of Jean Ruggerio, together with an affidavit by Dominic Ruggerio to the effect that he was a bona fide resident of Montgomery, Alabama, residing at 100 Commerce Street, that Jean Ruggerio was a non-resident of Alabama and had voluntarily abandoned him in 1961.

Mr. E. C. Boswell, a practicing attorney in Geneva, Alabama, testified that the Ruggerio divorce case was forwarded to him by the petitioner. Dominic Ruggerio came to Geneva on 12 December 1963. The witness did not know how long Ruggerio had been in Geneva. Perhaps the petitioner came with him but did not remember. Jean Ruggerio, to the witness' knowledge, did not come to Alabama. The witness represented Dominic Ruggerio in the divorce proceedings. Ruggerio made an affidavit stating he was a resident of Montgomery, Alabama, and that Jean Ruggerio, his wife, had voluntarily abandoned him on 7 June 1961. Other than the affidavit, the witness made no inquiry as to Ruggerio's residence. Ruggerio gave his testimony before the Register of the Inferior Court of Geneva County on 12 December 1963, and on 18 January 1964, the divorce decree was signed by the judge of said court. Mr. Boswell

did not know how long Ruggerio remained in Geneva after appearing before the Register on 12 December 1963.

An affidavit of Judge William F. Thetford, Judge of the Fifteenth Judicial Circuit of Alabama, (Montgomery County), was received in evidence. Judge Thetford deposes that he has been such judge since 1 November 1963, specifically assigned to hear domestic relations matters, including divorces. Continuously during his tenure the court dockets of said court have been current as to the processing of uncontested divorce cases. In proceedings involving a legitimate uncontested divorce, no more than a few hours, or at most one or two days, is required for disposition of such case.

Charge Nine (Nichols Matter)

Mrs. Florence Nichols, formerly Mrs. Florence Forcelli, testified before Maultsby Waller, the Commissioner appointed to take testimony upon the charges against the petitioner, that she first became acquainted with petitioner in February 1961, when she came to Alabama to get a divorce. She was then living in Danbury, Connecticut. On this occasion she was accompanied by Mr. Nichols. She and Nichols went to petitioner's office and she signed some papers. She returned to Connecticut and in April 1961, received from petitioner a copy of the decree divorcing her from Forcelli. Two weeks later she and Nichols were married.

In 1965, Mrs. Nichols had separated from Mr. Nichols and was living in Wilmington, Delaware. In the first part of December 1965, she telephoned petitioner, identified herself as having been Mrs. Forcelli and told petitioner she wanted to come to Alabama and get a divorce. Petitioner told her he would send her some papers in blank for Mr. Nichols to sign before a notary, and that his fee would be $650.00. She received the papers from petitioner and Nichols signed them before a notary public and returned them to her. She was supposed to mail the papers to petitioner who instructed her he would tell her when to come to Alabama.

However, Mrs. Nichols learned that some friends were driving to Tallassee, Alabama, on 24 December 1965, and she decided to ride down with them.

On 26 December 1965, she drove to Montgomery and called petitioner, telling him she had the executed papers, and the fee, and was told to come to petitioner's office. There she talked with petitioner and signed three sheets of paper which were blank except for her name typed on the bottom.

She asked petitioner when she would "get the papers" (divorce decree) and he told her not to be alarmed if she didn't get them until around February as the judge he was going to get to "do it" was on vacation. Mrs. Nichols paid petitioner $650.00 in cash, for which he gave her a receipt. The next day she returned to Tallassee, and from there returned to her home in Wilmington, Delaware.

The petitioner did not discuss with her any requirements as to residence in Alabama for divorce purposes.

Not having heard from the petitioner at the end of January 1966, she placed a call to petitioner's office but was told by his secretary he was out.

At the end of March, and again on 12 April 1966, she wrote to petitioner addressing the letters to petitioner's office in Montgomery. The envelopes bore her return address. She stated in each letter that she had not heard anything from petitioner, nor received any papers, and if anything was wrong to please notify her. She further told petitioner that if she were not going to get a divorce, she wanted her money back. She also recounted in her letters her efforts to reach petitioner by telephone. These letters were never answered, nor were they returned to her.

Mrs. Nichols moved from Wilmington back to Connecticut in April 1966, and prior to her departure she left her forwarding address in Wilmington. Since June 1966, she and Nichols have resumed their marital status.

The only witness called by petitioner testified before the Board of Commissioners on 3 March 1966. He testified that on 26 or 27 December 1965, he was in petitioner's office when a woman client came in. Petitioner asked the witness to wait outside his office. As the client left, he overheard her and petitioner discussing a divorce and petitioner told the woman her husband would have to sign some pa-

pers—that things were pretty hot in Alabama and "he couldn't jeopardize his law practice" and the petitioner discussed residency in Alabama.

On cross examination, the witness stated he did not remember the name of the woman, and he had first discussed this matter with the petitioner about a week before his appearance.

Assignments of Error

Assignment of error 11 is to the effect that the Board of Commissioners erred in overruling petitioner's objections denying the jurisdiction of the Board of Commissioners.

The petitioner, at the opening of the hearing before the Board of Commissioners of the Alabama State Bar, filed a pleading denying the jurisdiction of the Board to entertain the disbarment proceedings. Three grounds, A, B, and C, were set forth in support of the motion.

Ground A sets forth that there is a disparity of members of the Alabama State Bar among the thirty-six judicial circuits of Alabama, and therefore the composition of the Board is unconstitutional.

Ground B asserts that Rule 25, Section A, as amended, is invalid for the reason that the Board was unconstitutionally constituted.

These two grounds are argued jointly. It is petitioner's contention that since each judicial circuit elects one commissioner, and some circuits have a relative few members of the bar, while others have a large number of members, the composition of the Board is malapportioned and violates the "one man one vote rule."

We have considered the cases cited by appellant in support of his contention above set out, particularly *Baker v. Carr,* 369 U. S. 186, 82 Sup. Ct. 691, 7 L. Ed 2d 663; *Reynolds v. Sims,* 377 U. S. 533, 84 Sup. Ct. 1362, 12 L. Ed. 2d 506; *Ellis v. Baltimore,* 234 Fed. Supp. 945, and others.

We do not consider that the doctrines announced in this line of cases were intended to apply to an association of a

professional group, even though organized under the aegis of legislation, but were intended to apply to political governing bodies in the classical sense.

The organization of the Bar for the governing of the legal profession, and the administration of its duties is a matter peculiarly within the province of the Alabama Bar. We hold that the method of electing the Board of Commissioners is in no wise invalid.

The above disposes of petitioner's contention that Rule 25, Section A, as amended, is invalid for the reason that the Board of Commissioners was unconstitutionally constituted, i.e., malapportioned.

We observe, however, that even if it be assumed the petitioner's contention as to malapportionment of the Board contains merit, which we do not concede, it could not aid petitioner as laws passed by an malapportioned legislature are not invalid, *Reynolds v. Sims,* 377 U. S., supra; *Horton v. Bomar,* 335 F. 2d 583, nor are acts of a malapportioned county commission invalid, *Avery v. Midland County, Texas,* 390 U. S. 474, 88 Sup. Ct. 1114, 20 L. Ed. 2d 45, or acts of a possibly racially malapportioned draft board, *Clay v. United States,* (C.C.A. 5), 397 F. 2d 901; *Nelloms v. United States,* (C.C.A. 5), 399 F. 2d 295.

Further, the Board merely formulates rules, subject to approval by this court. Section 25(c), Title 46, Code of Alabama 1940. The rules formulated by the Board and submitted to this court are not effective until approved by this court. In its ultimate sense, the Rules of the Bar are therefore the rules of this court, and it cannot be rationally argued that this court is malapportioned since the members are elected statewide.

Ground C of the motion is to the effect that the Board is unconstitutional in that it is instituted in violation of Sections 42 and 43 of the Alabama Constitution of 1901, guaranteeing the separation of powers of government into three magistracies, the legislative, the executive, and the judicial, and further that the Board is instituted in violation of Section 139 of our Constitution relative to vesting judicial power.

These points were decided adversely to petitioner's present contentions in *Ex parte Thompson,* 228 Ala. 113, 152 So. 229. Counsel for petitioner argues, however, that the decision in *Ex parte Thompson* is erroneous and should be reexamined and overruled. We are not in accord with this view but observe that upon a reading of the lengthy and exhaustive opinion in *Thompson,* we find nothing that questions its correctness.

Assignment of error III presents the question of the qualification of some eight members of the Board of Commissioners to sit in the present proceedings since they were members of the Board in 1961, at the time when Rule 25, Section A, as amended, was formulated by the Board of Commissioners.

A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in litigation before him, *Norton v. Lyon Van and Storage Co.,* 9 Cal. App. 2d 199, nor does the fact that a prospective juror favors a statute, afford evidence that such juror is biased against a person accused of violating such statute. *State v. Sullivan,* 97 Wash. 639, 166 P. 1123. See also *48 C. J. S., Judges, Sec. 82,* and *50 C. J. S. Juries,* Sec. 244. By analogy those members of the Board who were also members at the time Rule 25, Section A was formulated were not, for that reason, disqualified to sit in the present proceedings.

Assignment of error V asserts error because of the action of the Board of Commissioners in denying petitioner's motion to suppress the deposition of Jean Ruggerio.

The grounds of such motion were that if the deposition were taken under the provisions of Title 7, Secs. 457, et seq., the deposition was faulty in that (1) no affidavit as to the necessity for taking such deposition was made before the proper official as required by Section 458 of Title 7, and (2) if the deposition was attempted under the provisions of Title 7, Secs. 474(1), et seq., it should be suppressed for the reason that such codal provisions are inapplicable to disbarment proceedings before the Board of Commissioners of the State Bar.

Counsel for the State Bar concedes that no affidavit was made prior to the taking of the Ruggerio deposition, but contend that the deposition was taken under the provisions of Title 7, Secs., 474(1), et seq. We can therefore lay aside any requirements of Sec. 458, Title 7, Code of Alabama 1940, in considering the point now argued.

Sections 474(1)-474(18), Title 7, Code of Alabama 1940, appearing as Article 6A, in said Title 7, provides a cummulative (sic) method for the taking of depositions.

Section 474(1), Title 7, in parts pertinent to this review, provides:

> "Any party may take the testimony of any person, including a party, by deposition upon the oral examination for the purpose of discovery, or for use as evidence in the action or for both parties."

Section 474(4) provides that at the trial any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition, or who had due notice thereof.

Section 474(7) provides that a reasonable notice shall be given the other party of the time and place of the taking of the deposition, and the name and address of the person to be examined.

It is to be noted that no affidavit is required prior to the taking of a deposition under the provisions of Sections 474(1)-474(18).

On 3 June 1966, a due and proper notice was sent to counsel for petitioner by registered mail that the deposition of Jean Ruggerio would be taken at a specified time and place on 23 June 1966, in Berkeley Heights, New Jersey, before an officer authorized to administer oaths by the laws of New Jersey, for the purpose of discovery or for use as evidence.

The deposition was duly taken in accordance with the notice. The petitioner made no appearance, either by writing, by counsel, or in person.

Section 25 of Title 46, Code of Alabama 1940, found in Article 1 of said Title relating to the organization of the Bar of Alabama, provides that:

> "***the evidence of witnesses residing outside such county (county of residence of charged attorney) may be taken in the same manner *as provided by law for the taking of depositions in civil cases.*" (Par. and Underlining ours.)

Likewise Rule 19, Section B of the Rules Governing the Conduct of Attorneys, also provides for the taking of depositions "in all respects as provided by law."

Counsel for petitioner in brief argues that:

> "There then exists serious doubt as to whether the Legislature could constitutionally make***Sec. 474(1), et seq., applicable to disbarment proceedings, and it is the position of defendant that to do so would violate his rights under Article 1, Section 6, of the Constitution of Alabama, 1901, and the Sixth Amendment, Constitution of the United States, as the same is made applicable to the State of Alabama by the Fourteenth Amendment."

This argument is succinctly answered by the following quotation from *Ex parte Messer,* 228 Ala. 16, 152 So. 244, a disbarment proceedings:

> "It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to *quasi criminal proceedings;* that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N. E. 407."

Both Section 25, Title 46, Code of Alabama 1940, and Rule 19, Section B, existed prior to the enactment of Section 474(1), et seq. Each refers only generally to the taking of depositions in the manner provided by law. Section

474(1) et seq., is general concerning the taking of depositions. It will be regarded as adopting by reference, not only the law in force at the time of its enactment, but even later legislation if any, on the subject. See *Carruba v. Meeks,* 274 Ala. 714, 150 So. 2d 195.

We hold that the Board did not err in denying petitioner's motion to suppress Mrs. Ruggerio's deposition.

Assignment of error VII asserts error by the Board in denying petitioner's objection to Maultsby Waller's appointment by the President of the Alabama Bar as a commissioner to take testimony in the proceedings against the petitioner. The basis of the objection to Mr. Wallar so serving was that he was a member of the Alabama Bar.

The interest relied on to disqualify must be a pecuniary one, and be affected by the event of the suit. *Ex parte Bar Association,* 92 Ala. 113, 8 So. 768. The Board did not err in overruling the objection to Mr. Waller to serve as commissioner to take testimony.

Assignment of error XIII relates to an alleged prejudicial argument made to the Board of Commissioners by Mr. Drayton Scott, representing the Bar, in the proceedings before the Board. Without passing upon whether Mr. Scott's argument exceeded permissible forensic boundaries, we note that it was stated by the presiding officer at the hearing that the Board had considered the matter and had voted to disregard the portion of the argument objected to, and sustained petitioner's objection.

To this, counsel for petitioner stated: "We will let it go at that."

In this state of the record, we find nothing to review. Assignment XIII we consider without merit.

Assignment of error IX is to the effect that the Board of Commissioners erred in overruling petitioner's motion to dismiss the complaint, as amended, against him.

Under this assignment, counsel for petitioner has argued a number of grounds assigned to the motion which we shall discuss in the order presented.

1. Rule 25, Section A, as amended, is invalid as being contrary to interpreted statutory law. Counsel for petitioner concedes that in order for a court of this state to have jurisdiction in divorce cases, one of the parties to the marriage must be domiciled in this state. *Jennings v. Jennings,* 251 Ala. 73, 36 So. 2d 236.

However, counsel argues that in a number of cases (*Lutsky v. Lutsky,* 279 Ala. 185; 183 So. 2d 782; *Levine v. Levine,* 262 Ala. 491, 80 2d 235, and *Multer v. Multer,* 280 Ala. 458, 195 So. 2d 105), this court has denied relief to the party questioning the divorce because of laches or estoppel on the part of the questioning party.

Therefore, counsel contends, the presumption must be that a divorce decree is to all intents and purposes valid until otherwise determined by appeal and it is impossible to state with assurance whether any divorce decree is null and void until tested by appeal.

The fallacy of this argument is that Rule 25, Section A in no way departs from the applicable divorce statutes as to jurisdiction, nor the decisions thereunder, but reinforces these principles. Rule 25 Section A, as amended, was formulated by the Bar, and approved by this court in an effort to eliminate, or lessen, the scandalous "quickie divorce" racket with its local and national ramifications. It is an effort to regulate the ethical conduct of attorneys, and the validity or invalidity of a divorce decree, or the operation of laches or estoppel is beside the point. We find no merit in this contention.

2. Counsel argues that Rule 25, Section A, as amended, is violative of the due process and equal protection provisions of the United States Constitution. It is counsel's contention that the effect of Rule 25, Section A, as amended, is to unreasonably classify "divorce" attorneys separate and apart from other attorneys.

The rule attempts no classification. It merely condemns a practice already contrary to law. It makes crystal clear that no attorney will, in uncontested divorce cases, be permitted to practice fraud upon a court, his client, and society as a whole, by asserting facts of jurisdiction when the

attorney knows, or reasonably should know, that no such jurisdictional facts exist.

Counsel also contends that by recognizing the state's interest in divorce matters, the courts are thereby merely continuing the interest of some religious views as to the indissolubility of marriage, thereby imposing religious views in the form of law, in violation of the First Amendment of the United States Constitution.

The fact that society as a whole, and religions, may both have interests in the continuation of marriages by no means violates any provision for the separation of church and state.

The interest of the church is basically an interest in the sanctity of marriage as a holy bond, while the interest of the state is basically materialistic, i. e., support of the wife and children and not casting them upon society for support, through admittedly many decisions in passing recognize the spiritual aspects of the marriage bond.

3. Counsel argues that the Grievance Committee which preferred charges against the petitioner was unlawfully appointed, in that it was appointed by the President of the Bar, rather than by the Board of Commissioners.

Section 25, Title 46, Code of Alabama 1940, sets forth the broad powers of the Board of Commissioners. Paragraph (e) of the Section authorizes the Board to appoint one or more committees to take evidence relating to complaints against attorneys. Paragraph (f) authorizes the Board to make rules and by-laws concerning the selection of committees and their powers and duties.

The Board of Commissioners on 5 April 1963, adopted a resolution that the members and terms of the Grievance Committee be fixed by the President. Such action by the Board was authorized by paragraph (f), supra. Authorizing the President to act in the premises merely permitted the President to advantageously perform for the Board a practical detail looking toward the administration of the duties cast upon the Board. No wrongful delegation of powers resulted in this situation.

4. Lastly, counsel for petitioner argues under this assignment that the officers of the Alabama Bar, other than the Board of Commissioners, are without power to act because the members of the Bar must attend the annual convention of the Bar in order to vote for such officials.

The requirement that members of the Bar must vote in person at the annual meeting of the Bar is one well within the administrative powers of the Bar. That some members of the Bar must travel longer distances than others to attend such annual meeting, violates no constitutional right.

Assignment of error XI relates to the action of Mr. Waller, the Commissioner to take testimony, in sustaining on 6 September 1966, petitioner's objection to the hearing being held in Montgomery County Courthouse, and thereupon continuing the hearing until 1:00 P.M., and transferring the same to the Elmore County Courthouse.

It appears that on 5 August 1966, Mr. Waller was duly appointed Commissioner to take testimony as to the complaints against petitioner, the hearing to be held at Montgomery County Courthouse on 6 September 1966, at 10:00 A.M. The petitioner was served with notice of this hearing on 31 August 1966.

Petitioner and counsel appeared before Commissioner Waller at date set, 6 September 1966, and interposed an objection to the hearing in Montgomery County on the grounds petitioner was a resident of Elmore County. Appearing as a witness solely for the purpose of testifying as to his residence, the petitioner testified that he had maintained a law office in Montgomery County since 1962, though he had had his residence in Elmore County since 1961, and also had an office in his home. In the last election, he had voted in Elmore County. Commissioner Waller thereupon sustained petitioner's objection to the hearing being had in Montgomery County, and continued the hearing to 1:00 P.M., to be conducted in the Courthouse in Elmore County, some 18 miles distant. The petitioner had not subpoenaed any witnesses. At the beginning of the hearing in Elmore County, the petitioner objected to the hearing being had there.

Counsel for petitioner states in brief:

> "This is a question of *power to act,* not a question of exercise of judicial power to determine whether or not prejudice to the defendant resulted."

Rule 13, Section B, provides that notice of hearing shall be given an accused attorney of the date fixed for the hearing at least five days prior to the date fixed. Notice of the hearing was given petitioner more than five days in advance.

Rule 15, Section B, provides that upon the day so fixed, the evidence shall be taken at the Courthouse of the county wherein the accused attorney resides.

The above provision is essentially a venue provision for the convenience of the accused attorney. Undoubtedly, it is a matter that could be waived. It in no wise goes to jurisdiction in its true sense to conduct the hearing. The petitioner had subpeonaed no witnesses for the hearing. Because of his objection, the hearing was moved to Elmore County, for hearing later in the day. We find no probable injury to any substantial right of the petitioner in the action of Commissioner Waller in the premises.

Assignment of error 1 asserts that the Board of Commissioners erred in entering judgment of disbarment in that the legal evidence adduced is insufficient to support such judgment.

We have carefully read the record in this case and are clear to the conclusion that the legal evidence, and the reasonable inferences therefrom, presented to the Board, is ample in its tendencies to support the resolution of guilt entered under Charges five, six, seven, and nine, and to support the resolution of disbarment.

As we stated in *In re McKay,* 280 Ala. 174, 191 So. 2d 1:

> "An attorney must be accorded due process in disbarment and disciplinary proceedings, and the requirements of due process are met when the attorney is served with charges or specifications reasonably in-

forming him of the charges against him and the attorney is thereafter accorded a hearing with an opportunity to defend. See 7 Am. Jur., supra, Sec. 64.

"The above requirements of due process being met, formal and technical pleadings are not essential, nor do they have any place in a disbarment proceeding. In Re Fite, 228 Ala. 4, 152 So. 246; McCord v. State, 220 Ala. 466, 126 So. 873; Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A.L.R. 671; Ex parte Grace, 244 Ala. 267, 13 So. 178."

AFFIRMED.

All the Justices concur,, except Lawson, J., not sitting.

THE SUPREME COURT OF ALABAMA
THURSDAY, JANUARY 30, 1969
THE COURT MET PURSUANT TO ADJOURNMENT
PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES SIMPSON, MERRILL, COLEMAN, HARWOOD AND BLOODWORTH.
NOT SITTING: ASSOCIATE JUSTICE LAWSON.

3rd Div. 277

In the Matter of Thomas W. Sullivan

(Re: Thomas W. Sullivan v. Board of Commissioners of Alabama State Bar)

PETITION FOR REVIEW

Come the parties by attorneys, and the Petition for Review being argued and submitted and duly examined and understood by the Court,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the resolution, order and judgment of the Board of Commissioners of the Alabama State Bar, finding Thomas W. Sullivan guilty of Charges 5, 6, 7 and 9 preferred against him and disbarring the said Thomas W. Sullivan from the practice of law, be and the same is hereby affirmed in all things; said order of disbarment to begin when the final judgment in this cause shall have been entered in this Court.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the costs incident to those proceedings be and the same are hereby taxed against the petitioner, Thomas W. Sullivan, for which costs let execution issue accordingly.

Per Curiam Opinion

All the Justices concur, except Lawson, J., not sitting.

THE SUPREME COURT OF ALABAMA
THURSDAY, MARCH 6, 1969
THE COURT MET PURSUANT TO ADJOURNMENT
PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN, HARWOOD AND BLOODWORTH.

3rd Div. 277

In the Matter of: Thomas W. Sullivan
(Re: Thomas W. Sullivan v. Board of Commissioners of Alabama State Bar)

PETITION FOR REVIEW

IT IS ORDERED that the application for rehearing filed on February 13, 1969 be and the same is hereby overruled.

Constitution, Statutes and Rules Involved

I

Constitution of The United States, Amendment I.

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof;***

II

Constitution of the United States, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

III

Constitution of the United States, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV

Title 28, Section 1257(3), United States Code.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

V

Title 34, Section 27, Code of Alabama, 1940

For abandonment, twelve months' residence to be proved.

No bill can be filed for a divorce on the ground of voluntary adandonment, unless the party applying therefor, whether husband or wife, has been a bona fide resident citizen of this state for twelve months next preceding the filing of the bill which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VI

Title 34, Section 29, Code of Alabama, 1940

If defendant a nonresident, a year's residence by plaintiff must be proved.

When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved: provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VII

RULE 16, SECTION A.

Board of Commissioners of the Alabama State Bar

No person heretofore or hereafter admitted to practice law in Alabama shall . . .,

16. Introduce or offer to introduce any testimony he knows to be false or forged.

VIII

RULE 25, SECTION A, as last amended.

Board of Commissioners of the Alabama State Bar

25. No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) File or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false.

IX

RULE 36, SECTION A, as last amended.

Board of Commissioners of Alabama State Bar

36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 184

THOMAS W. SULLIVAN,
Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1468.

THOMAS W. SULLIVAN,
Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent.

BRIEF OF RESPONDENT.

INTRODUCTION.

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Respondent respectfully submits that the Petitioner has failed to present any federal question of substance not heretofore determined by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED.

The Petitioner has presented seven questions. The Respondent submits that the questions presented are more clearly and accurately stated as follows:

QUESTION A: Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Alabama affirmed the Board's action, without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?

QUESTION B: Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?

QUESTION C: Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns "any conduct unbecoming an attorney at law", but Rule 3, Section B, requires that a complaint against an attorney must charge in writing "that such an attorney has violated or failed to comply with one

or more of the rules, referring to such rule or rules by the numbers" and with "such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of"?

QUESTION D: Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?

QUESTION E: Where the statutory law of the State of Alabama as interpreted by The Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona fide resident of the State, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony on the issue of residency "with knowledge or reasonable cause to believe" that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

QUESTION F: Does the First Amendment of the United States Constitution which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof;" as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?

QUESTION G: Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of the State of Alabama from enact-

ing Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violations of such Rules?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court as set forth below in the Argument and Appendix to this Brief of Respondent.

STATEMENT OF THE CASE.

The Statement of the Case in the Petition for Writ of Certiorari sets forth accurately and chronologically the general nature of the pleadings filed and the hearings conducted in these proceedings but omits certain details concerning the nature of the charges against the Petitioner which the Respondent deems pertinent.

The Grievance Committee of the Alabama State Bar filed a series of eleven charges against the Petitioner alleging a violation or failure to comply with certain of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama. Section A of the Rules sets forth a series of duties which are required of attorneys and a series of acts which are prohibited. Section B of the Rules provides a detailed method of procedure to be followed in the investigation and trial of complaints that may be made concerning the conduct of any attorney (239 Ala. XXIII-XXX).

On June 30, 1964, Charges 1, 2, 3 and 4 were filed (R. 1-9). The first three charges alleged that the Petitioner participated in obtaining certain specific divorces in violation of Rule 25, Section A, which proscribes the filing or prosecution of divorce cases ". . . with knowledge or reasonable cause to believe that neither party . . ." is a bona fide resident of the State of Alabama. Charge 4 incorporated by reference the allegations of the first three charges, and charged that in doing the identical specific acts, the Petitioner was guilty of violating Rule 36, Section A, which condemns ". . . conduct unbecoming an attorney at law."

The charges were amended on April 29, 1966, by adding thereto Charges 5, 6 and 7 (R. 20-21A). Each charge relates to the Petitioner's participation in the divorce case of **Ruggerio v. Ruggerio**, Inferior Court of Geneva

County, Alabama, No. A-256, charging a violation of Rule 25, Section A, Rule 16, Section A, and Rule 36, Section A. Rule 16, Section A, prohibits the introduction of false or forged testimony.

On November 14, 1966, four additional charges were filed (R. 228-234). Charge 8 was dismissed and was not considered by the Board of Commissioners. Charges 9, 10 and 11 alleged that Petitioner had accepted certain sums of money from three different non-residents with the assurance that he would obtain divorces in violation of the provisions of Rule 25, Section A; that he failed to obtain such divorces or refund the money in violation of Rule 36, Section A.

On March 3, 1967, the Board found the Petitioner guilty of Charges 5, 6 and 7 (**Ruggerio v. Ruggerio**) (R. 20-21A), and Charge 9 (**Nichols**) (R. 231-232), and fixed the discipline as disbarment as to each charge separately and severally (R. 339-346).

ARGUMENT.

Question A.

Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Albama affirmed the Board's action, without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?

The Petitioner does not contend that any member of the Board of Commissioners of the Alabama State Bar entertained any personal bias as to the Petitioner, and the record reflects that the members of the Board of Commissioners were impartial in this regard. The Petitioner does not contend that any member of the Board of Commissioners entertained any preconceived convictions concerning the Petitioner's guilt or innocence of the charges, and the record reflects that the Commissioners were impartial in this respect.

The bias which would disqualify a member of the Board from sitting and hearing charges against an attorney must be bias personal to the accused attorney, and the mere fact that a member of the Board might favor the particular Rule which the attorney is charged with violating is of no consequence. It might be safely

assumed that all members of the Board advocate the enforcement of all of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, and this assumption might equally apply to the Justices of the Supreme Court of Alabama, who adopted the Rules and thus gave them validity.

To insure a fair and impartial tribunal, Title 46, § 25, Code of Alabama, 1940, provides that "If any member of said Board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such Board any cause provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges." This statutory provision expressly insures to an accused attorney a fair and impartial tribunal. The Petitioner does not contend that the statute has not been followed.

Wilson v. State, 243 Ala. 1, 8 So. 2d 422, cited by the Petitioner, involved a criminal prosecution, a murder trial, and the alleged bias of the challenged juror was based upon facts completely dissimilar to those in the instant case. **Shapiro v. The City of Birmingham**, 30 Ala. App. 563, 10 So. 2d 38, also cited by the Petitioner, is completely inapposite; it dealt with the violation of a city ordinance and the challenged juror was an employee of the plaintiff city, a policeman charged with the duty of enforcing the ordinance.

Certainly, no substantial question is posed under the Sixth and Fourteenth Amendments, United States Constitution.

Question B.

Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?

The charges were duly filed with the Secretary of the Board and the Petitioner personally accepted service. The President entered an order appointing a Commissioner to take evidence and fixed a hearing date as provided by Rule 12, Section B (R. 17); the Secretary gave the requisite notice described in Rule 13, Section B, and a hearing was conducted on September 6, 1966, pursuant to such order and notice (R. 57-184).

At the hearing before the Commissioner thus appointed the testimony of four witnesses was presented and two depositions were tendered in evidence.

Identical procedure was followed and two witnesses testified before the Commissioner on January 9, 1967 (R. 238-285) and the affidavits of two Circuit Judges were put in evidence, there being no objection that this testimony was in affidavit form rather than by deposition.

The testimony was transcribed and filed with the Secretary, who furnished copies thereof to all the members of the Board. At the final hearing before the Board on March 3, 1967, Petitioner was permitted to present the testimony of two witnesses.

It is conceded that the use of depositions is sanctioned by statute, Title 46, Section 25, Code of Alabama, 1940, (A-2), and Rule 19, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama (A-6).

The Supreme Court of Alabama approved the use of depositions upon the authority of its prior decision, in **Ex parte Messer**, 228 Ala. 16, 162 So. 244. The courts of other states have held that depositions are admissible in disciplinary proceedings against attorneys, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of an unworthy or disreputable member. **State ex rel. Kehoe v. McRae**, 49 Fla. 389, 38 So. 605; **State v. Mosher**, 128 Iowa 82, 103 N. W. 105.

Clearly the due process clause of the Fourteenth Amendment does not render depositions inadmissible in a proceeding resulting in the revocation of a professional license. In **Missouri ex rel. Horwitz v. North**, 271 U. S. 40, a Missouri statute was upheld which authorized the State Board of Health to revoke licenses to practice medicine for certain specified causes and provided that: "Testimony may be taken by deposition to be used in evidence at the trial of such charges before the Board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases." Petitioner cites no authority for the proposition that depositions are inadmissible in disciplinary proceedings, but states that **Spevak v. Klein**, 385 U. S. 511 has placed in "limbo" the validity of certain statements contained in **Messer**, supra. Petitioner seeks to expand the holding in **Spevak** far beyond anything which the facts of the case or the language of the opinion will warrant. **Spevak** stands for the limited proposition that an attorney cannot be disbarred where the only evidence of misconduct merely consists of his exercising his constitutional privilege to refuse to answer questions or to furnish information on the grounds that such might tend to incriminate him.

Two fallacious assumptions pervade the Petitioner's argument. The Petitioner erroneously defines inquiries by

the judicial department of a state government into the qualifications of one of its officers as "criminal prosecutions" within the contemplation of the Sixth Amendment. The Petitioner further equates such inquiry to a typical "law suit" or judicial trial.

Duncan v. Louisiana, 391 U. S. 194, and **Bloom v. Illinois,** 391 U. S. 194, are clearly distinguishable.

Duncan involved a criminal prosecution in the classical sense, a simple battery, which under Louisiana law is a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. The case holds that trial by jury in **criminal cases** is fundamental to the American scheme of justice and that the Fourteenth Amendment guarantees a right of a jury trial in all **criminal cases** which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee, and that a **crime** punishable by two years imprisonment is a serious crime requiring a jury trial, and not a more petty offense.

In **Bloom** it was held that prosecutions for serious criminal contempts are subject to the jury trial provisions of the Federal Constitution, and the Sixth Amendment, which is made binding on the states by virtue of the due process clause of the Fourteenth Amendment. The defendant's demand for a jury trial had been denied in the state court, and he was found guilty and sentenced to 24 months imprisonment. The opinion carefully notes that a criminal contempt proceeding is exactly parallel to a criminal prosecution in the classical concept, in both its objectives and results.

> ". . . serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States . . ."
>
> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is

punishable by fines or imprisonment or both . . ."
"Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates."

Pointer v. Texas, 380 U. S. 400, is the only case cited by the Petitioner which even touches on the Sixth Amendment right to confrontation. The case merely holds that the transcript of the testimony of a complaining witness given at a preliminary hearing, at which the defendant, a **layman**, who had no counsel, did not cross-examine, is inadmissible at the defendant's trial for the **crime** of robbery. The Petitioner in the instant case, an attorney, has been represented throughout all proceedings by able counsel and all witnesses have been subjected to thorough cross-examination, although he made no appearance at the taking of certain depositions, either by writing, by counsel, or in person.

Duncan and **Pointer** involved "criminal prosecutions", and **Bloom** was concerned with criminal contempt which ". . . is a crime in the ordinary sense . . ."

In contrast, all courts have consistently held that an investigation of the conduct of an attorney as an officer of the courts is not a criminal proceeding.

As early as 1869, in holding that a judge was not civilly liable for his removal of an attorney as an officer of the court, this Court in **Randall v. Brigham**, 74 U. S. 523, described the nature of disbarment proceedings as follows:

> "All that is necessary to their validity is that . . . notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."
>
> . . .

In rejecting the claim that the attorney had been denied certain rights afforded defendants in criminal prosecutions under the Massachusetts Constitution, the court observed:

> ". . . It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legem terrae' as used in the Magna Charta, or in the Declaration of Rights."

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, this Court in **Ex parte Wall**, 107 U. S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them."

The Petitioner was afforded due notice of all proceedings, was afforded an opportunity to cross-examine all witnesses and to present such testimony in his own behalf

as he might desire. The Petitioner has presented no authority for the proposition that the use of depositions in a disciplinary proceeding offends any provision of the United States Constitution, and the cases involving criminal prosecutions or criminal contempt proceedings have no application.

Question C.

Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns "any conduct unbecoming an attorney at law", but Rule 3, Section B, requires that a complaint against an attorney must charge in writing "that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers" and with "such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of"?

Petitioner was found guilty of Charges Five, Six, Seven and Nine. Charges Seven and Nine alleged a violation of Rule 36, Section A, which condemns "any conduct unbecoming an attorney at law". To test the validity of Rule 36, Section A, it must be read in *pari materia* with the entire body of the Rules, which describe in Section A the actions on the part of attorneys which are specifically required or prohibited and in Section B, sets forth the method of procedure to be followed in the investigation and trial of complainants.

Rule 3, Section B, provides:

> "It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, **referring to some rule or rules by the**

> **numbers hereinabove set forth**, and such specification of conduct complained of as will **fairly and reasonably give the accused reasonable information of the acts or offenses complained of**" (Emphasis added).

It is thus obvious that an attorney is afforded an opportunity to (a) establish that he did not perform the acts which are the subject of the complaint, and (b) if the acts are admitted, establish that the acts do not constitute a violation of a specific rule.

The Board of Commissioners of the Alabama State Bar, which promulgated the Rules, and the Supreme Court of Alabama, which approved the Rules and gave them validity, felt that a basically dishonest but ingenious individual might carefully pattern his conduct so as to circumscribe, though narrowly, every Rule other than Rule 36, Section A, and nevertheless, be guilty of conduct which deserved, if not demanded, discipline. It was felt that in dealing with an honorable profession rather than a purely commercial trade, some comprehensive rule was necessary, in order to prevent the fundamentally unethical from carefully avoiding the violation of some specific rule, but whose actions manifestly demonstrated a breach of the high standards demanded of attorneys as officers of the courts.

To demonstrate that other courts are in agreement with this view, we need look to no less an authority than the Supreme Court of the United States. Rule 8, Revised Rules of the Supreme Court of the United States, provides:

> "Where it is shown to the court that any member of its bar. . . . has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court." Applied in **In re Baker**, 297 U. S. 691.

Rule 46 (b) Federal Rules of Appellate Procedure, is substantially identical (A-1).

Statutes, rules of court, or rules promulgated by bar associations, which are similar, if not identical, to Rule 36, Section A, Rules of the Supreme Court of Albama Governing the Conduct of Attorneys in Alabama, exist in many states. The discipline of a professional group would be difficult, if not impossible, without a rule of similar import.

Petitioner's contention that the procedures by which a court strikes the name of an attorney from the roster of its officers as unworthy to remain thereon should be treated as "strictly criminal" has never been embraced by any court. **Randall v. Brigham**, supra, and **Ex Parte Wall**, supra.

The high standards of the profession have developed over centuries, and present no mystery to the well intentioned practitioner. In matters of ethics, an attorney seldom errs through ignorance. In testing a statute or rule for alleged impermissible vagueness practicalities must be considered, together with the evil which the statute is designed to prevent.

The qualities of character which entitle one to become an attorney and officer of courts of a state and a member of the bar of the Supreme Court of the United States must be stated in general terms rather than confined to a series of precise and specific "Thou shalt nots."

In **Schware v. Board of Bar Examiners of New Mexico**, 353 U. S. 232, this Court approved Rule 1, Rules Governing Admission to the Bar of New Mexico, which provides: "An applicant for admission to the Bar, either upon examination or upon certificate and motion must be . . . of good moral character . . ." N. M. Stat. Ann., 1953, No. 18-1-8, stating:

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any quali-

fication must have a rational connection with the applicant's fiitness or capacity to practice law."

Frankfurter, J., concurring, noted that the standards governing the profession cannot be stated within precise bounds.

> "Nor is the division of power between this Court and that of the States in such matters altered by the fact that the judgment here challenged involves the application of a conception like that of 'moral character' which has shadowy rather than precise bounds. It cannot be that that conception—moral character—has now been found to be so indefinite, because necessarily implicating what are called subjective factors, that the States may no longer exact it from those who are to carry on 'the public profession of the law.' (See Elihu Root, in 2 A. B. A. Jr. 736). To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession . . ."

In **Konigsberg v. State Bar of California**, 353 U. S. 252, the requirement was again approved, this Court (Black J.) observing:

> "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect."

Rule 36, Section A, Rules of The Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama prohibiting "conduct unbecoming an attorney at law," and Rule 8, Revised Rules of the Supreme Court of the United States prohibiting "conduct unbecoming a mem-

ber of the bar of this court," when measured against a background of experience extending over centuries of development of standards of honesty and fairness of members of an honorable profession is even more definitive than "good moral character," a test for admission to the bar which has been specifically upheld, **Schware v. Board of Bar Examiners of New Mexico**, supra, and **Konigsberg v. State Bar of California**, supra.

The Petitioner does not even imply that the specific conduct described in Charges Seven and Nine does **not** constitute "conduct unbecoming an attorney at law," and if a state applied an admittedly permissible standard when there was no basis for its finding that such standard was not met, or where its action was invidiously discriminatory, relief to the aggrieved party would be clearly available. **Schware v. Board of Bar Examiners of New Mexico**, supra, and **Konigsberg v. State Bar of California**, supra.

Terms such as "unprofessional conduct" or "conduct unbecoming" a member of a profession such as law or medicine are not unconstitutionally vague. **Brinkley v. Hassig** (1936 CA 10th Kan.), 83 F. 2d 351; **Yoshizawa v. Hewitt** (1931 CA 9th Hawaii), 52 F. 2d 411 ("gross carelessness or manifest incapacity"); **Lehmann v. State Board of Public Accountancy**, 236 U. S. 394 ("any unprofessional conduct"). The view is generally expressed that such terms acquire an understandable meaning within a particular profession.

In the case of **Ex parte Secombe**, 60 U. S. 9, a rule to show cause why the peremptory writ of mandamus should not issue commanding the Judges of the Supreme Court of the Territory of Minnesota to restore an attorney to his office was denied. The opinion pointed out that a Minnesota statute described in only general terms some

of the offenses for which attorneys might be removed, and observed:

> "Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counselor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."

Of course, in making the determination that a lawyer is guilty of conduct unbecoming an attorney at law, the conduct in question must be such as is generally condemned by all responsible members of the bar. The Petitioner does not argue that his conduct described in Charges Seven and Nine does not fall within that category, and does not seek review upon that ground.

We again emphasize that the Rules must be read as a whole. If an attorney entertains doubts as to the ethical propriety of contemplated action, he is adequately protected by Rule 37, Section A, which provides:

> "But no attorney shall be subject to disciplinary measures for any action on his part, who, prior to such action has received from the Grievance Committee its written opinion that such action was justifiable or permissible."

Petitioner's challenge of Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama raises no substantial federal question under the due process clause of the Fourteenth Amendment, United States Constitution.

Question D.

Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?

On June 13, 1966, the Petitioner filed with the Board of Commissioners his Motion to Dismiss Complaint, as Amended (R. 22-25), and as ground 13 contained therein asserted that the proceedings were void for failure to provide a trial by jury in violation of the state and federal constitutions. Assignment of Error 9 filed with the Supreme Court of Alabama assigned as error the Board's action in overruling the Motion to Dismiss Complaint, as Amended, referring to the Motion filed on June 13, 1966, and to similar motions filed on September 6, 1966, October 31, 1966, and December 12, 1966. These various motions contain 33 distinct paragraphs or grounds. The right to trial by jury was never argued before the Supreme Court of Alabama in briefs or in oral argument, and a reading of the opinion of said Court (Appendix A, pp. A1 through A17, Appendix to Petition for Writ of Certiorari) will readily reveal that this proposition was never even considered. Petitioner cannot assert this alleged right for the first time before the Supreme Court of the United States when the Supreme Court of Alabama was given no opportunity to pass upon his claim.

The Petitioner again erroneously assumes that the objective and result of an inquiry by the judicial department of a state or the federal government into the qualifications of an officer of the courts is to mete out "punishment." This contention has been emphatically refuted

by every court which has addressed the subject. **Randall v. Brigham**, supra, and **Ex parte Wall**, supra.

The Petitioner cites only one authority, namely, **Bloom v. Illinois**, supra. There this Court was very careful to draw the almost identical parallel between a criminal contempt proceeding and the prosecution for the violation of a criminal statute. The analogy fails when we are dealing with an investigation into the conduct of a member of the bar. Any hardship which may be inflicted upon an offending attorney is incidental to the only real objectives and results of such proceedings which is **protection** of the courts, the legal profession generally, and the public at large and not **punishment**, as described in criminal prosecutions and criminal contempt proceedings.

The Supreme Court of the United States and other federal courts have disciplined attorneys as members of their respective bars and no right to trial by jury has been afforded by virtue of the provisions of the Sixth Amendment, United States Constitution, which guarantees such right "In all criminal prosecutions . . .". The Petitioner does not claim that such right to jury trial existed at common law at the time of the adoption of the Constitution of the United States (Inasmuch as a proceeding is now pending before the Supreme Court of the United States which could lead to Petitioner's disbarment as a member of such Court under Rule 8, Revised Rules of the Supreme Court of the United States, **In the Matter of the Disbarment of Thomas W. Sullivan**, No. 2000 Misc., and inasmuch as the decision and opinion of the Supreme Court of Alabama is not conclusive in such proceeding, and issues of fact could be independently pursued therein, **In re Isserman**, 345 U. S. 286, 348 U. S. 1, **Selling v. Radford**, 243 U. S. 46, we assume that the petitioner will raise his alleged Sixth Amendment right to jury trial before the Supreme Court of the United States.)

It would be a strange anomaly if the Fourteenth Amendment, which makes the Sixth Amendment applicable to the State of Alabama required the state courts to afford a jury trial in a disbarment proceeding while the Sixth Amendment of its own force imposed no such requirement upon the federal courts.

Question E.

Where the statutory law of the State of Alabama as interpreted by the Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona-fide resident of the State, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony on the issue of residency "with knowledge or reasonable cause to believe" that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

The Supreme Court of Alabama has held that one party to divorce proceeding must be a bona fide resident of the state. **Jennings v. Jennings**, 251 Ala. 73, 36 So. 2d 236.

The Petitioner cites certain cases in which one of the parties to a divorce proceeding because of laches or estoppel was precluded from attacking the validity of a decree. **Levine v. Levine**, 262 Ala. 491, 80 So. 2d 235; **Lutsky v. Lutsky**, 279 Ala. 185, 183 So. 2d 782.

Petitioner asserts "Rule 25, Section A, as amended, causes the obtaining by an attorney of basically legal results to be denominated unethical." Petitioner, thus, would appear to condone the action of an attorney in perpetrating a fraud upon the court if he obtained "legal" results.

Whether or not the evidence as to residency is sufficient is obviously a question of fact reviewable on appeal. **Levy v. Levy**, 256 Ala. 629, 56 So. 2d 344; **Hilley v. Hilley**, 275 Ala. 617, 157 So. 2d 215.

However, the validity *vel non* of the divorce decree is beside the point. The possible laches or estoppel of a party is equally beside the point. It is the conduct of the attorney with which Rule 25, Section A, is concerned. The fact that there may be three parties to the perpetration of a fraud upon the court, namely, the complainant, the respondent and the attorney, and the circumstances are such that perhaps both complainant and respondent are estopped to challenge the validity of the decree, does not purge the attorney of wrongdoing if he, in fact, had "knowledge or reasonable cause to believe that neither party . . ." was a bona fide resident. As the Supreme Court of Alabama stated in the opinion below, "Rule 25, Section A, in no way departs from the applicable divorce statutes as to jurisdiction, nor the decisions thereunder, but re-enforces these principles." It is difficult to conceive that the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, could preclude a state from attempting to prevent attorneys from perpetrating a fraud upon its courts.

Question F.

Does the First Amendment of the United States Constitution which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof"; as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?

The Petitioner appears to argue for "divorce by consent", i. e., the only grounds necessary therefor being

the expressed desire of the parties to be divorced, and further contends that a state cannot constitutitionally impose the requirement that one party to the divorce proceeding must be a bona fide resident of the state.

The Petitioner seems to attack the divorce requirements of the State of Alabama rather than Rule 25, Section A, which, in effect, prohibits attorneys from presenting perjured testimony concerning residency in divorce proceedings "with knowledge or reasonable cause to believe . . ." that such testimony is false. The constitutional validity, *vel non*, of Rule 25, Section A, is the only matter that should properly be considered in the instant case.

Petitioner asserts that the law governing divorce had its origin in the ecclesiastical courts of England; that to deny parties the right to "divorce by consent" regardless of the true residency of the parties is a violation of the First Amendment prohibition against "law respecting an establishment of religion, or prohibiting the free exercise thereof;" as made applicable to the states by the Fourteenth Amendment.

The fact that many federal laws and numerous laws of many states had their origins in the views of certain religious sects does not render them constitutionally infirm. The fact that the public policy reflected in such laws may parallel certain religious notions concerning the health, safety and general welfare of the community is of no consequence.

In **Reynolds v. United States**, 98 U. S. 145, a statute making bigamy a crime and imposing penalties therefor was upheld although plural marriages were sanctioned, and even required, by the defendant's religious beliefs, and in **McGowan v. Maryland**, 366 U. S. 420, the State's Sunday Closing Laws were held valid although concededly

the observance of Sunday as a day of rest had its origin in the tenets of certain Christian sects. Mr. Chief Justice Warren, in announcing the opinion of the Court, stated:

> ". . . . There is no dispute that the original laws which dealt with Sunday labor were motivated by by religious forces . . .
>
> . . . the 'Establishment Clause' does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So, too, with the questions of adultery and polygamy. **Davis v. Beason**, 133 U. S. 333; **Reynolds v. United States**, supra. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue."

Despite the religious overtones in the law of marriage and divorce, the state of the true domicile of the parties has a vital interest, aside from religious considerations, since broken homes can, and often do, result in destitute parties or children who become wards of the state. The state of the true domicile of the parties is saddled with these tragic problems, not the State of Alabama.

An officer of the courts, should be subject to discipline for submitting perjured testimony "with knowledge or reasonable cause to believe" in its falsity, and the fact that the laws of Alabama on the subjects of marriage and divorce may coincide with some religious views does not deprive the parties to the divorce, and much less the

Petitioner, of any right protected by the "establishment" and "free exercise" clauses of the First Amendment.

Question G.

Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of the State of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violations of such Rules?

The Petitioner makes reference to no specific provision of the Bill of Rights, but relies upon the general due process clause of the Fourteenth Amendment. He cites no authority whatsoever to support his contention that the Fourteenth Amendment, United States Constitution, prohibits the Judicial Department of State Government acting through the Supreme Court of Alabama, the Board of Commissioners of the Alabama State Bar and its committees and officers from dealing with all phases of a proceeding concerning the investigation of an attorney's conduct.

The Supreme Court of Alabama, as the head of the Judicial Department of State Government, establishes rules governing the conduct of attorneys as officers of said Court upon the recommendation of the Board of Commissioners of the Alabama State Bar.

Petitioner appears shocked at the fact that the Supreme Court of Alabama and the Board of Commissioners through its committees and officers are involved in all phases of the procedures involving the discipline of attorneys. We assume that the Petitioner is equally shocked at the fact that the Supreme Court of the United States is involved in all

phases of the procedures dealing with the discipline of its officers as evidenced by the pending proceedings against the petitioner. **In the Matter of the Disbarment of Thomas W. Sullivan**, No. 2000, Misc., wherein the Petitioner has been afforded the opportunity to show cause why he should not be disbarred from the Supreme Court of the United States because of the decision and opinion of the Supreme Court of Alabama disbarring Petitioner from practice before said Court. The Supreme Court of the United States enacted Rule 8, will make a determination as to Petitioner's violation thereof, and execute an order of disbarment if a determination of guilt is its conclusion. In effect, the Supreme Court of the United States will act as rule maker, accuser, prosecutor, judge and jury.

The Petitioner completely misconceives the essential nature of the proceedings leading to the removal of an attorney as an officer of the courts.

The action of the judicial department of the federal government and of the judicial departments of state government in determining whether attorneys must be removed as officers of their respective courts is essentially a judicial rather than an "executive" or "legislative" function. This is true of every step of the proceedings from the establishment of rules of conduct, and determination of a violation thereof, to the striking of an accused attorney's name from the roster of the officers of the court.

This Court through affirmance on April 28, 1969, **Sullivan v. Alabama State Bar**, October Term 1968, No. 1170, held that the "one man, one vote" principle has no relevancy to the Board of Commissioners of the Alabama State Bar. The United States District Court had observed that the powers conferred upon the Board are more judicial than legislative in nature quoting from **Ex parte Thompson**, 228 Ala. 113, 152 So. 229, as follows:

"The Supreme Court of Alabama has held that in reviewing disbarment proceedings 'this court is in the exercise of its original and inherent powers in the matter of disbarment of attorneys at law.' The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the leading case of **Ex parte Thompson,** 1933, 152 So. 229, 238, 239:

'We will now address ourselves to a consideration of the question whether the Legislature of Alabama acted within constitutional bounds in creating the board of commissioners of the state bar, and in conferring upon it the powers enumerated in the act. No doubt it was attempted to confer upon the board thus created powers highly judicial in nature. This board is given authority to formulate rules governing the conduct of all persons admitted to practice and to investigate and pass upon all complaints that may be made concerning the professional conduct of any person who has been or who may hereafter be admitted to the practice of the law, and to formulate rules governing the reinstatement of members of the bar who have been disbarred and to pass upon all petitions for reinstatement. The board is empowered to provide for the taking of evidence, and, on hearing of any complaint against an accused attorney, in all cases in which the evidence, in the opinion of a majority of the board, justifies such a course, they are required to take such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom as the case shall in their judgment warrant, provided that in cases of exclusion or disbarment a majority of the board shall vote affirmatively before the exclusion and disbarment shall become effective. But the rules

and regulations which may be formulated and adopted by the board shall not become effective until the same shall have received the approval of this court, and the right of this court to approve or disapprove all or any part of the rules so formulated and adopted by the board is fully reserved to this court. More than this, this court is expressly given the right to review on petition of party aggrieved, the action of the board, *and may, on its own motion, and without the certification,* inquire into the merits of the case, and take *any action,* agreeable *to their judgment.* If this court should desire it, additional testimony may be taken.' ".

"Section 139 of the Constitution, as presently pertinent, reads:

" 'The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, *and such persons as may be by law invested* with powers of a judicial nature. * * *' (Italics supplied.)

"Thus we find express constitutional warrant for conferring upon *this board* judicial functions; and this conclusion is supported by the decision of this court in the case of State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913. We fail to see, in the creation of the board of commissioners of the state bar with the powers conferred, any transgression of constitutional bounds by the Legislature, and, as for any constitutional objections assigned, and here argued, we hold that the act does not violate any of the provisions of the Constitution urged and assigned by appellant."

"Thus it appears that the State Supreme Court, in the exercise of its original and inherent powers in disbarment proceedings, can remedy any errors committed by any claimed malapportionment of the Board of Commissioners."

The Petitioner begins with the conclusion that the instant case presents classic reasons for granting the Writ of Certiorari but fails to cite any authority or demonstrate that the Supreme Court of Alabama has decided a federal question of substance not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court. The Petitioner makes the bald assertion that the procedures employed by the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are strikingly similar to the methods used by the High Commission in England in the latter part of the Sixteenth Century in exposing heretics. This initial statement by Petitioner demonstrates the absurdity of his position. The Petitioner sets forth no single novel issue but relies upon a culmination of procedural steps, each of which has been upheld as valid and which insure an accused attorney of every opportunity to prove his innocence of the charges and present any defense available to him.

The statute, Title 46, Section 36, Code of Alabama, 1940 (A-4), and Rule 6, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Albama (A-5) required that the charges filed against the Petitioner on June 30, 1964, April 29, 1966, and November 14, 1966, be served upon the Petitioner, and in the instant case, the Petitioner accepted service thereof.

Title 46, Section 36, Code of Alabama, 1940, provides:

"Any member of the bar complained of shall have notice and opportunity to defend by the introduction of evidence and the examination of witnesses called

against him, and the right to be represented by counsel. He shall also have the right to require the secretary to summon witnesses to appear and testify or produce books, papers, documents or other writings necessary or material to his defense in like manner as above provided."

Rule 10, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama (A-5), provides that an accused attorney may file his written plea or pleas directed to the charges and further provides that if no plea be filed, the matter shall proceed as if the plea of the general issue had been interposed.

The Petitioner filed numerous pleadings in these proceedings, namely, Plea in Abatement, July 21, 1964 (R. 11-13); Amendment to Plea in Abatement, July 29, 1964 (R. 14-16); Motion to Dismiss Complaint as Amended, September 6, 1966 (R. 33-35).

Testimony was taken at hearings before a Commissioner duly appointed by the President pursuant to the provisions of Rule 12, Section B (A-6), and due notice was given of such hearings as required by Rule 13, Section B (A-6). The Petitioner, through his attorney, participated in these hearings and subjected the witnesses presented by the Grievance Committee to thorough cross-examination. The Petitioner chose not to testify in his own behalf and his refusal to answer certain questions propounded to him by counsel for the Grievance Committee becomes immaterial to these proceedings in view of the dismissal of Charge 8, which describes this action on the Petitioner's part.

The Petitioner's statement that his many motions and objections, etc., "were summarily overruled", is misleading. At the final hearing before the Board of Commissioners on March 3, 1967, the Petitioner was permitted

to present oral argument with regard to each of his various motions and objections. Furthermore, the Petitioner was permitted to file with the Board of Commissioners a lengthy brief concerning these motions and objections and he distributed copies of such brief to each member of the Board prior to March 3, 1967. After argument on both the law and facts, the Board found the petitioner not guilty of Charges 1, 2, 3, 4, 10 and 11, and found him guilty of Charges 5, 6, 7 and 9. Upon review of the proceedings before the Board of Commissioners, the Supreme Court of Alabama considered the action of the Board of Commissioners without any presumption as to the correctness of the Board's findings on questions of law and fact.

Title 46, Section 25, Code of Alabama, 1940, provides:

> "The supreme court may, and on petition of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment. Rules regulating the manner of such review and providing for the certification of the evidence, or if the supreme court desire, the taking of additional evidence, shall be promulgated by said board and become effective upon approval by the supreme court."

From a review of the above described procedure and the record in this case, it can readily be seen that the statutes and rules involved do not offend any principles of justice so rooted in the traditions and conscience of the people of the United States as to be ranked as fundamental and are well within the power of the Judicial Department of the State of Alabama to promulgate in order to purge the roster of the Supreme Court of Alabama of officers deemed unfit. **Speiser v. Randall**, 357 U. S. 424.

We are to be guided in this case by the standards established by this Court to insure that an attorney is accorded due process in a disciplinary proceeding. The opinion in **Theard v. United States**, 354 U. S. 278, contained the following:

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in **Konigsberg v. State Bar of California**, 353 U. S. 252, 77 S. Ct. 722, and **Schware v. Board of Bar Examiners**, 353 U. S. 232, 77 S. Ct. 752, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. 'Membership in the bar is a privilege burdened with conditions,' (Matter of Rouss, 221 N. Y. 81, 84, 116 N. E. 782, 783.) The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' People ex rel. **Karlin v. Culkin**, 248 N. Y. 465, 470-471, 162 N. E. 487, 489, 60 A. L. R. 851. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them in 'good standing' so to do."

As stated in **Ex parte Wall**, supra:

> "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern."' " Cooley's Const. Lim. 353.
>
> "The question what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson v. New Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'"

CONCLUSION.

The Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama in a proceeding which commenced on June 30, 1964, concluded as a result of numerous hearings concerning both the fact and the law, that the petitioner, Thomas W. Sullivan, does not possess those requisites of character and fitness which entitled him to have his name remain on the roster of the officers of the Supreme Court of Alabama entitled to practice law in said State. For the reason stated herein, it is re-

spectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

STATUTES AND RULES INVOLVED.

I.

Rule 8, Revised Rule of the Supreme Court of the United States.

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

II.

Rule 46 (b), Federal Rules of Appellate Procedure.

(b) **Suspension or Disbarment.** When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

III.

Title 46, Section 25, Code of Alabama, 1940.

The board of commissioners shall have power: (a) to determine, by rules, the qualifications and requirements for admission to the practice of law; (b) to conduct, through a board of examiners, hereinafter provided for, the examination of applicants; and such board of examiners shall certify to the supreme court the names of the applicants found to be qualified; such certifications shall entitle such persons to be enrolled in the bar of the state and to practice law, provided the fees hereafter required are paid; (c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice, and to investigate, or cause to be investigated, and to pass upon, all complaints that may be made concerning the professional conduct of any person who has been, or may hereafter be, admitted to the practice of the law; (d) subject to the approval of the supreme court, to formulate rules governing the re-instatement of members of the bar who have been disbarred, and to pass upon all petitions for re-instatement; (e) to appoint one or more committees from the membership of the board, or from the membership of the entire bar, or partly from one and partly from the other, to take evidence in connection with any complaint filed against any attorney and forward the same to the board. In all cases, testimony with reference to such charges shall be taken at the courthouse of the county of the residence of the party charged, provided the evidence of witnesses residing outside of such county may be taken in the same manner as provided by law for the taking of depositions in civil cases. The state solicitor of the circuit in which such accused attorney resides shall prosecute any such charge or case, interrogate the witnesses, introduce the evidence in support of such charges, and, when requested by any member

of the board, argue the cause before the board. The board shall administer such discipline, by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall, in their judgment, warrant. A majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board. The supreme court may, and on petition of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment. Rules regulating the manner of such review and providing for the certification of the evidence, or if the supreme court desire, the taking of additional evidence, shall be promulgated by said board and become effective upon approval by the supreme court; (f) To make rules and by-laws not in conflict with any of the terms of this chapter concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the board and of the state bar. (g) To hold and conduct educational and social meetings and activities among the members of the bar, to publish journals and generally to do such things as in their judgment may tend to improve the educational and ethical standing of bench and bar. (h) Should any vacancies occur on said board, to fill such vacancies by appointment of a member of the state bar from the judicial circuit in which said vacancy exists and such appointee shall hold for the time of the unexpired term or pending the election of his successor. (i) To establish circuit or branch associations of the state bar and if circuit associations are established, the member of the board from said circuit shall be ex officio the president of such circuit association. Said circuit or branch association shall have no authority to

suspend or disbar attorneys and in all matters shall be subordinate to the authority of the board. If any member of said board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such board any causes provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges. Said board shall have no authority, nor shall it in any way undertake, to regulate the fees or charges of lawyers for the rendition of their professional services.

IV.

Title 46, Section 36, Code of Alabama, 1940.

§ 36. (6236) **Rights of accused member.** Any member of the bar complained of shall have notice and opportunity to defend by the introduction of evidence and the examination of witnesses called against him, and the right to be represented by counsel. He shall also have the right to require the secretary to summon witnesses to appear and testify or produce books, papers, documents or other writings necessary or material to his defense in like manner as above provided.

V.

Rule 37, Section A, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

. . . But no attorney shall be subject to disciplinary measures for any action on his part who, prior to such action, has received from the Grievance Committee its written opinion that such action was justifiable or permissable.

VI.

Rule 3, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

3. **Contents of Complaint.** It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers hereinbefore set forth, and such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of.

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VIII.

Rule 6, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

6. **Filing and Service of Complaint.** One copy of such complaint shall be filed with the Secretary and one copy thereof shall be served upon the accused attorney in person within a reasonable time after the filing thereof, and proof of such service shall be promptly filed with the Secretary. . . .

IX.

Rule 10, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

10. **Defendant's Plea.** Within twenty days from the service of such complaint upon such attorney, the accused attorney shall file in the office of the Secretary his written plea or pleas. If no plea be filed within the said time, the Board shall proceed as if a plea of the general issue had been filed.

X.

Rule 12, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

12, **President's Order Fixing Date, and by Whom Testimony Taken.** The evidence may be taken either (a) by the Grievance Committee of the Board, or (b) by a Commissioner designated by the President, or (c) by the Board, and the President shall determine whether the evidence shall be taken by the Grievance Committee of the Board or by a Commissioner or by the Board. The President shall thereupon make and cause to be filed with the Secretary an order fixing a date for taking the evidence upon the said complaint.

XI.

Rule 13, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

13. **Notice by Secretary of Date Set for Hearing.** The Secretary shall give notice of the date so fixed to the accused attorney and to the Proctor of the Alabama State Bar by registered mail, which notice shall be given at least five (5) days prior to the date so fixed.

XII.

Rule 19, Section B, Rules of the Alabama Supreme Court Governing the Conduct of Attorneys in Alabama.

19. **Summoning Witnesses: Production of Papers.** Witnesses may be summoned by the Board, its President, its Secretary, any Girevance Committee, any Chairman of a Grievance Committee, or by the Commissioner, their appearance and testimony required, the oath administered, depositions taken, and the production of books, papers and other documents required in all respects as provided by law.